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No. 07-1239

In the Supreme Court of the United States

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit upheld a preliminary injunction that seriously restricts the Navy's use of mid-frequency active (MFA) sonar during vitally important training exercises in the Southern California Operating Area (SOCAL). That injunction overrides the judgments of the President and the Nation's top naval officers as to the paramount national security interest in using MFA sonar effectively in those training exercises, the Congress as to when such national security interests may trump the general public interest in marine mammal protection, the federal agency charged with protecting marine mammals as to the risks posed by the use of MFA sonar during the exercises, and the federal agency charged with interpreting the National Environmental Policy Act (NEPA) as to appropriate steps for satisfying

NEPA's procedural requirements going forward. In addition, the injunction rests on a fundamental misapplication of the equitable principles that have long governed the entry of a preliminary injunction.

Respondents have provided no reason for this Court to embrace that injunction. Indeed, respondents have essentially abandoned the reasoning of the lower courts that the Council on Environmental Quality (CEQ) improperly determined that "emergency circumstances" warranted alternative NEPA arrangements under 40 C.F.R. 1506.11. Instead, respondents now argue that NEPA does not permit CEQ to authorize *any* alternative arrangements for complying with NEPA in the circumstances here, mount a separation-of-powers attack on the application of CEQ's longstanding "emergency circumstances" regulation, and raise various other challenges to the invocation of that regulation. To the extent they are properly before this Court, none of those arguments fares any better than the reasoning of the lower courts that even respondents no longer seriously defend.

With respect to the exercise of equitable discretion, respondents urge this Court to follow in the footsteps of the Ninth Circuit and disregard the professional judgments of the Commander-in-Chief, the Chief of Naval Operations, and other top naval officers regarding the serious impact of the injunction on military readiness and national security. Further, respondents greatly overstate the demonstrated threat of potential injury or death to marine mammals. In the end, all respondents can point to is the *possibility*—despite the absence of any evidence of harm to marine mammals from the Navy's use of MFA sonar in SOCAL over the past 40 years—that the MFA sonar training at issue will injure or kill marine mammals. But that "possibility" is not

sufficient to support a finding of irreparable injury to respondents under established equitable principles governing injunctive relief. And, in any event, it is not sufficient to outweigh the vital public interest in military readiness and the training exercises at issue.

I. RESPONDENTS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Respondents Offer No Serious Defense Of The Rulings Below That CEQ Misinterpreted Its Own Regulation

Respondents effectively abandon the holdings of the courts below that formed the legal foundation for the preliminary injunction. Under 40 C.F.R. 1506.11, an agency is authorized to make alternative arrangements when "emergency circumstances" render it necessary to take an action with significant environmental impact without observing the provisions in CEQ's regulations governing preparation of an environmental impact statement (EIS). CEQ reasonably construed that regulation to permit such alternative arrangements here to enable the Navy to conduct effective, vital training exercises in SOCAL using MFA sonar until the completion of an EIS in January 2009 concerning all naval activities within SOCAL. The district court clearly erred in rejecting CEQ's interpretation of its own regulation, and the Ninth Circuit compounded that error by deferring to the district court's interpretation rather than CEQ's. See Gov't Br. 21-33.

The NRDC respondents dedicate only one sentence to that issue in their merits brief, making the conclusory assertion that the courts below were "correct" in concluding that an "emergency" under Section 1506.11 requires the circumstances to be "unforeseen" as well as "urgent" (Br. 22). And the California Coastal Commis-

sion (CCC) makes no attempt at all to defend that merits ruling (Br. 2). Respondents' failure to offer any meaningful defense of the legal rulings below is alone sufficient to justify reversal of the district court's extraordinary injunction at this interlocutory stage of the case.

B. NRDC's Alternative Arguments Furnish No Basis For Affirming The Preliminary Injunction

1. NEPA allowed alternative arrangements in the "emergency circumstances" confronting the Navy

Although respondents effectively concede that the courts below erred in rejecting CEQ's interpretation of its "emergency circumstances" regulation, they urge affirmance of the preliminary injunction on the alternative ground that CEQ's and the Navy's invocation of the regulation as so interpreted violated NEPA. But just as CEQ's interpretation of its own regulation is entitled to "controlling weight" where, as here, it is not "plainly erroneous or inconsistent with the regulation," *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), CEQ's interpretation of NEPA is entitled to "substantial deference," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 355-356 (1989). CEQ's conclusion that the Navy's action is consistent with NEPA, as interpreted by Section 1506.11, is reasonable and therefore entitled to deference.

CEQ was "established by NEPA with authority to issue regulations interpreting it," and CEQ has promulgated regulations setting out steps that agencies must follow. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 756-757 (2004); see *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (citing 42 U.S.C. 4344(3)). Those regulations impose numerous procedural require-

ments, see, *e.g.*, 40 C.F.R. 1501.4, 1502.1-1503.4, 1506.6, but also make clear that they may properly be displaced with alternative arrangements in "emergency circumstances." 40 C.F.R. 1506.11.

The "emergency circumstances" regulation was promulgated in 1979 and has been invoked some 41 times. See CEQ, *Alternative Arrangements* (updated Sept. 2008) <http://www.nepa.gov/nepa/eis/Alternative_Arrangements_Chart_092908.pdf>; 137 Cong. Rec. 7008-7009 (1991). Without such accommodation, NEPA would have prohibited, *inter alia*, the government's prompt restoration of critical infrastructure for human habitation after Hurricane Katrina, immediate action necessary to preserve endangered species, and cargo-flight operations essential to maintain military readiness in the wake of the first Gulf War. Cf. Gov't Br. 30-31. No court has ever found such common-sense emergency arrangements to violate NEPA. Even NRDC has represented to Congress that "*NEPA itself* allows for emergency action prior to the completion of environmental documentation in consultation with the CEQ." *Id.* at 23 n.4 (quoting testimony). And Congress—which is presumed to be aware of Section 1506.11 and its repeated administrative invocation since 1980—has declined to amend NEPA in light of that understanding. See *ibid*.

That understanding is a manifestation of the "rule of reason" that is "inherent in NEPA" and that must inform the "policies behind NEPA and Congress' intent." *Public Citizen*, 541 U.S. at 767-768. It also is consistent with NEPA's direction that agencies must, "to the fullest extent possible," prepare a detailed statement to accompany proposed action. 42 U.S.C. 4332(2)(C). While the phrase "fullest extent possible" emphasizes that environmental considerations are not to "be shun-

ted aside in the bureaucratic shuffle," *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976), the need for alternative arrangements in emergency circumstances reflects statutory and operational imperatives, not mere bureaucratic convenience. Indeed, Congress itself provided that agencies must carry out the "policy set forth in [NEPA]" in a manner "consistent with other essential considerations of national policy," 42 U.S.C. 4331(b), which necessarily include the need for prompt action in emergency circumstances in order to protect the public interest and prevent serious harm.

NRDC notes (Br. 34-35) that the current series of SOCAL exercises was planned in 2006, and it contends that preparation of a full EIS was "neither impossible nor impractical" because the Navy could have prepared an EIS at that time. The critical point, however, is that the Navy was confronted in January 2008 with an urgent need to proceed immediately with its planned training exercises to fulfill its statutory obligations under 10 U.S.C. 5062 and prepare for wartime deployment. It was impossible or impractical *at that time* to prepare a full EIS before proceeding. Even if an EIS should have been prepared prior to that time, that omission did not diminish the paramount public importance of proceeding as planned.

Although NEPA provides that all agencies shall include a detailed statement of environmental impact in every proposal for major federal action significantly affecting the quality of the human environment, NEPA "nowhere specifies the consequences of a failure" by agency officials to do so. *Brock* v. *Pierce County*, 476

U.S. 253, 259 (1986).[1] "This Court has frequently articulated the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Id.* at 260 (quoting *United States* v. *Nashville, Chattanooga & St. Louis Ry.*, 118 U.S. 120, 125 (1886)). For that reason, the Court has been "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Ibid.*; see generally *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003) (discussing cases). Those principles apply *a fortiori* to the imperative of military readiness, especially where the President and top military officers have determined that the action is "essential to national security." Pet. App. 232a. CEQ's and the Navy's invocation of the "emergency circumstances" regulation in this case therefore is consistent not only with NEPA itself but also with settled background principles of statutory construction.

NRDC's contrary position is based on its view that alternative arrangements under Section 1506.11 constitute an "exempt[ion] * * * from NEPA" that Congress has not authorized. NRDC Br. 33. That objection is flawed on several grounds. First, as this case illustrates, alternative arrangements are a means of *complying* with NEPA. CEQ approved emergency arrange-

[1] CEQ's regulations do provide that until an agency issues a record of decision following preparation of an EIS, it shall take no action that would have an adverse environmental impact or limit the choice of reasonable alternatives. 40 C.F.R. 1506.1(a). But, of course, Section 1506.11 does not require compliance with such regulations where, as here, "emergency circumstances" are present.

ments for the Navy involving enhanced public-participation, research, and mitigation measures to serve as a bridge until the Navy's ongoing EIS covering all future activity in SOCAL could be completed. Pet. App. 240a-248a. Because Section 1506.11 provides a means for complying with NEPA, NRDC is wrong in suggesting (Br. 1, 3) that the Navy has conceded that it has violated NEPA.

Second, even if Section 1506.11 is viewed as authorizing exemptions from NEPA's usual EIS requirement, such exemptions are authorized by NEPA in emergency circumstances, for the reasons discussed above. The fact that Congress has enacted discrete exemptions from NEPA for specific agency actions that may not have qualified as "emergency circumstances" (see NRDC Br. 33) does not speak to whether NEPA itself permits emergency actions to go forward before the normal EIS process can be completed. Likewise, NRDC's reliance (at 34 & n.8) on *Flint Ridge* and *Calvert Cliffs Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), is misplaced. Neither case involved action taken to respond to emergency circumstances or the validity of Section 1506.11.

Here, moreover, the Navy acted reasonably and in good faith in attempting to comply with NEPA and CEQ's implementing regulations, and its actions effectively satisfied the three core statutory requirements in NEPA itself. The Navy's comprehensive 293-page Environmental Assessment (EA) addressing the environmental impacts of and alternatives to the series of 14 exercises in this case (E.R. 44-336; J.A. 107-224) would constitute a "detailed statement" of environmental impacts under any reasonable reading of that statutory

requirement. 42 U.S.C. 4332(2)(C). As also required by Section 4332(2)(C), the Navy consulted with relevant federal agencies before issuing that statement, which accompanied its proposal and is available with appropriate agency comments under FOIA. Accordingly, while the additional requirements specified by CEQ regulations have not been met, the Navy has effectively complied with NEPA's minimum statutory mandate under Section 4332(2)(C). See, *e.g.*, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 & n.15 (1976).

Respondents ultimately lose sight of the fact that NEPA is a procedural statute that does not impose any substantive limit on agency action or require the agency to mitigate any resulting environmental consequences. *Methow Valley*, 490 U.S. at 350, 353 & n.16. NEPA should not be construed to demand the utmost adherence to the normal EIS procedures (which would not prevent any agency decision) where, as here, agency action in emergency circumstances is needed to avert substantial injury to the public interest *before* that process can be completed and where suitable alternative arrangements, including a timetable for completing an EIS, are approved by the agency charged with administering NEPA.

2. The Navy's alternative arrangements do not violate constitutional separation of powers

Relying on *Hayburn's Case*, 2 U.S. 408 (1792), NRDC contends that the Navy's acceptance of alternative arrangements approved by CEQ violated separation of powers on the ground that CEQ usurped Article III power by reviewing the district court's injunction. NRDC Br. 24-29. That argument, which the lower

courts declined to reach, Pet. App. 56a n.47, 123a, is without merit.

In *Hayburn's Case*, five Justices, sitting as circuit judges, concluded that circuit courts could not comply with a statute directing them to determine the appropriate amount of veterans' pensions because the statute gave the Secretary of War discretion to adopt or reject such determinations. See *Miller* v. *French*, 530 U.S. 327, 342-343 (2000). As this Court has explained, *Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Id.* at 343 (citation omitted).

The rule of *Hayburn's Case* is inapposite here. First, in determining whether the longstanding administrative requirements of Section 1506.11 were met, CEQ in no practical, much less legal, sense sat as a court of review with respect to the district court's preliminary injunction, which rested on a determination that the Navy's EA did not comply with requirements under NEPA. Rather, CEQ addressed the distinct question of compliance with an *alternative* mechanism and determined that the requisite "emergency circumstances" were present. Pet. App. 240a; see *id.* at 247a-248a. The fact that the government returned to district court to lift the injunction, which continued in force after CEQ's determination, underscores that CEQ did not impermissibly exercise judicial power to "review" the injunction.

Second, "prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." *Miller*, 530 U.S. at 347. The Navy's acceptance of alternative arrangements approved by CEQ altered the relevant law that the Navy was required to follow under

NEPA and CEQ's regulations—on the new assumption, given the district court's decision, that the training would have a significant environmental impact. It was then for the courts to decide whether the Navy's actions were appropriate under that legal framework, according deference to CEQ's interpretation of NEPA and its implementing regulations and reviewing Executive determinations concerning the need for training using MFA sonar and the resulting impact on marine mammals under the arbitrary and capricious standard in 5 U.S.C. 706(2)(A). That is a routine Article III task. The absence of any impermissible interference with judicial power is especially clear here because the district court had not even entered a final judgment in the case. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219, 227-228 (1995).

NRDC asserts (at 29) that a change in the law warranting the vacatur of equitable relief can result only from an Act of Congress, but it provides no reason why Executive action—exercising authority granted by Act of Congress—cannot have the same effect or would infringe judicial power any more than legislation. If, for instance, an action is enjoined as unlawful, the subsequent issuance of an otherwise valid regulation or permit authorizing that action could warrant lifting the injunction. Or, if the legal basis for an injunction is later undermined by agency action construing relevant law so as to make the "obligations placed upon the parties * * * impermissible under [that] law," *Miller*, 530 U.S. at 347 (citation omitted), there would be no basis for the injunction's prospective application. Cf. *National Cable & Telcomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-985 (2005). Similarly, this Court has acknowledged that the President could exercise author-

ity under the Clean Water Act to exempt agency action that a court previously enjoined. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982). CEQ's approval of alternative arrangements for NEPA compliance is not constitutionally different.

3. NRDC's remaining challenges to CEQ's determination were waived below and lack merit

NRDC's contentions (at 21-23, 30-32, 36-37) regarding collateral estoppel, CEQ's adjudicatory authority, and 5 U.S.C. 555(b) are raised for the first time in NRDC's merits brief to this Court and therefore have been waived. See *Baldwin* v. *Reese*, 541 U.S. 27, 33-34 (2004); *Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998). In any event, the contentions lack merit.

First, CEQ was not collaterally estopped from approving alternative arrangements for "emergency circumstances" by the district court's finding that the Navy could adequately "train under the challenged mitigation measures" ordered by the court. NRDC Br. 22-23. The matters to be addressed by the Executive officials charged with training Navy personnel and implementing NEPA are inherently different from those to be weighed by a district court incidental to deciding whether equitable relief is warranted, and the Constitution and Congress have vested the former determinations with the responsible Executive Branch officials. *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988); *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141-146 (1940). Moreover, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits," *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981); Fed. R. Civ. P. 54(b), and they therefore have no preclusive effect, *Com-*

munity Nutrition Inst. v. *Block*, 749 F.2d 50, 56 (D.C. Cir. 1984) (Scalia, J.).

Second, respondents' contention that CEQ does not have "adjudicatory authority" is irrelevant. No formal adjudication under 5 U.S.C. 554 was required for CEQ or the Navy to invoke Section 1506.11. Indeed, it would be utterly unrealistic to expect any sort of extensive agency proceedings in the "emergency circumstances" covered by the regulation. CEQ's role was instead to consider the submissions by the Navy and the National Marine Fisheries Service (NMFS) and determine whether the prerequisites for application of CEQ's own regulation were satisfied, and the Navy's role was to decide whether to accept the alternative arrangements advanced by CEQ. No more formal "adjudicatory" power was required simply because a federal district court previously had preliminarily enjoined the same series of exercises on other grounds.

Finally, NRDC's assertion that it was entitled to notice of CEQ's consideration of alternative arrangements is misplaced. NRDC Br. 36-38. Such notice is not required by the Administrative Procedure Act (APA). In providing that "an interested person may appear before an agency * * * for the presentation, adjustment, or determination of an issue" "[s]o far as the orderly conduct of public business permits," 5 U.S.C. 555(b), the APA does not require that agencies provide public notice of such action. Compare 5 U.S.C. 553(b) and (c), 554(b) (requiring notice in other contexts). The APA's legislative history confirms that Section 555(b) "merely [requires agencies] to receive the presentations of those who seek to make them" and "does not require agencies to give notice to all who may be affected." S. Rep. No. 752, 79th Cong., 1st Sess. 19 (1945); see *Attorney Gen-*

eral's Manual on the Administrative Procedure Act 63 (1947) (provision does not "requir[e] an agency to give notice of its proposed action" or "to invite appearances by interested persons").[2]

II. THE PRELIMINARY INJUNCTION IS FUNDAMENTALLY INCONSISTENT WITH ESTABLISHED EQUITABLE PRINCIPLES

Even assuming that respondents have established a likelihood of success on the merits, the preliminary injunction must be vacated because it is inconsistent in several fundamental respects with established equitable principles governing the grant of injunctive relief.

A. The District Court Improperly Disregarded The Balance Struck By Congress

In the Marine Mammal Protection Act (MMPA), Congress specifically determined that the general interest in marine-mammal protection must yield to the demands of military readiness and national security where, as here, the Secretary of Defense has so determined and notified Congress. See Gov't Br. 35-37. Respondents incorrectly contend that the enactment of 16 U.S.C. 1371(f) in 2003 is irrelevant in determining whether the preliminary injunction was appropriate. NRDC Br. 38-40; CCC Br. 14-23. To be sure, this Court does "not lightly assume that Congress has intended to depart from established [equitable] principles." *Romero-Barcelo*, 456 U.S. at 313. But with respect to the precise ground on which the court rested its equitable relief, Congress has made clear that the balance of the

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[2] This Court has "repeatedly given great weight" to the *Attorney General's Manual* in construing the APA. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988).

equities associated with the use of sonar for military readiness and marine species protection should be struck in favor of military readiness.

The fact that Congress enacted the controlling provision in the MMPA, rather than NEPA, is of no moment because once Congress has "decided the order of priorities in a given area," courts are without discretion to "reject the balance that Congress has struck in a statute." *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (citation omitted); Gov't Br. 34-35. And this Court has elsewhere held that remedial authority to enforce one statute may be circumscribed by provisions in another statute. See, *e.g.*, *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002). The asserted "harm" to marine mammals the district court credited in granting an injunction therefore is not properly cognizable as a factor supporting an injunction barring use of MFA sonar. That is especially so since the statute the court's injunction was intended to enforce (NEPA) is only procedural and imposes no substantive requirements that could override Congress's judgment in the MMPA.

In amending the MMPA in 2003, Congress was motivated by the wartime goal of "keeping our men and women in uniform alive when they are in combat" and its recognition that, in part because of injunctions like that here, "we are losing * * * our ability to practice our sonar capability," which is a matter of "life and death" for Navy personnel. 149 Cong. Rec. 12,564 (2003) (statement of Rep. Hunter); see Gov't Br. 36-37. Moreover, Congress acted in the wake of an injunction—just like the one at issue here—that was founded in part on an alleged violation of NEPA and that severely discounted the potential harms to national security and the public

interest by enjoining the Navy's use of low-frequency active sonar. *NRDC* v. *Evans*, 232 F. Supp. 2d 1003, 1051, 1055 (N.D. Cal. 2002). Congress presumably believed that it would be preventing the same situation from occurring again, but the Ninth Circuit has allowed just that.

Respondents' observation that Congress did not separately enact an "exemption" from NEPA misses the point. The existence of the "emergency circumstances" regulation already provided a mechanism under NEPA itself to accommodate such situations, as NRDC informed Congress in 1995. Gov. Br. 23 n.4. Moreover, the question of a complete exemption from NEPA is distinct from whether a court, after finding a NEPA violation, may enjoin essential military readiness activities based on its own assessment of military needs and appropriate substantive protections for marine mammals, where, as here, Congress by statute has already specifically struck the balance it deemed appropriate between those precise equities.

Congress authorized the Secretary to take military actions that will harm marine mammals—*regardless of the magnitude* of that harm—when he determines that such action is necessary for national defense. 16 U.S.C. 1371(f). And, by requiring the Secretary to confer with the agencies with marine mammal expertise and by guaranteeing congressional oversight, Congress unmistakably placed the responsibility for properly administering the balance between marine mammals and military readiness squarely within the political Branches.

B. The "Mere Possibility" Of Irreparable Injury Cannot Support The Preliminary Injunction

The injunction is also unfounded because it is the product of the erroneous "mere possibility" standard that the Ninth Circuit uses to evaluate claims of irreparable injury.

1. Respondents' half-hearted defense of the Ninth Circuit's "mere possibility" standard is unavailing. This Court has made clear that a preliminary injunction is an "extraordinary and drastic remedy" for which the movant must provide "substantial proof" making a "clear showing" that such extraordinary relief is necessary. *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); Gov't Br. 38-39. Respondents do not—and cannot—show how the Ninth Circuit's longstanding practice of granting such extraordinary relief based on the "mere possibility" of harm is consistent with that principle. NRDC Br. 49-50; CCC Br. 26-27. The Ninth Circuit's "mere possibility" threshold is fundamentally inconsistent with considerations that have for centuries governed the entry of injunctive relief.

Respondents' reliance on *Brown* v. *Chote*, 411 U.S. 452 (1973), and *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), is misplaced. Neither case suggests, much less holds, that injunctive relief may be awarded based on a "possibility" of either injury or success. Moreover, respondents' interpretation of *Brown* (like that of several court of appeals decisions) simply confuses two distinct uses of the word "possibility." In fact, the threatened injury in *Brown* was far from a mere possibility. 411 U.S. at 457 (explaining that movant's "opportunity to be a candidate *would* have been foreclosed" without relief) (emphasis added). Likewise, in *Doran*, the Court explained that a plaintiff must meet a "stringent" standard

by showing that "he will suffer irreparable injury" without relief, 422 U.S. at 931, and the parties did not dispute that the plaintiffs "would suffer a substantial loss of business and perhaps even bankruptcy" if relief were denied. *Id.* at 932.

NRDC invokes (Br. 49-50) the sliding scale that some courts use in evaluating a likelihood of irreparable injury. Even assuming that the requisite showing of injury may vary somewhat, however, the Ninth Circuit's "mere possibility" standard, which expressly rejects the need for any "significant threat" of injury, Pet. App. 76a-77a, establishes a threshold that cannot be squared with the extraordinary nature of preliminary relief. Indeed, it renders the likelihood-of-irreparable-injury test virtually meaningless. See Gov't Br. 38-39.

2. Rather than seriously defend the "mere possibility" of harm standard, respondents focus their efforts on arguing that the lower courts did not apply that standard in this case. That contention is unavailing. The record makes clear that both the court of appeals (see Pet. App. 36a, 76a-77a) and the district court (see *id.* at 74a-75a) evaluated respondents' request for injunctive relief through the distorted lens of the "mere possibility" standard. Respondents point to the fact that the court of appeals noted the district court's determination that "irreparable harm to marine mammals will almost certainly result." Pet. App. 87a. But that observation cannot be squared with the court of appeals' acknowledgment that the record contains "no evidence" that marine mammals have been harmed during the 40 years of MFA sonar training in SOCAL, *id.* at 76a. Moreover, the court of appeals held that "NRDC must show the possibility of irreparable harm to its membership," not the environment, *id.* at 75a, and concluded that NRDC

had done so by establishing a mere "possibility" of such harm. *Id.* at 76a-77a. And respondents themselves continue to defend the injunction under that "possibility" standard in this Court. See CCC Br. 25.

a. In any event, the record does not support a finding of anything other than a "mere possibility" of harm. The Ninth Circuit recognized that the record contains "no evidence" that marine mammals have been injured or killed by naval training exercises in SOCAL, Pet. App. 76a, and respondents do not dispute that the Navy has conducted equivalent sonar exercises in SOCAL for over 40 years without any associated harm to marine mammals being observed or documented. Gov't Br. 11, 39-41 & n.7. Because the areas in SOCAL where "most operations have occurred are monitored quite extensively for marine mammals" and those waters contain large marine-mammal populations, the absence of any such data over decades of training presented NMFS's experts with "evidence [they] could not ignore" indicating that the Navy's training has not had any measurable effect on the fitness of marine mammals in SOCAL. J.A. 541-542, 629; see J.A. 231-232, 511-512. Indeed, the evidence indicates not only that SOCAL's populations of non-listed mammals like common dolphins are increasing, E.R. 153, 159, but also that no systematic declines have resulted in marine-mammal stocks, and that SOCAL's endangered species populations are stable or increasing. J.A. 232, 516-517, 541-542; cf. J.A. 147. That evidence itself dispels any reasonable basis for respondents' purported irreparable injury, let alone a near certainty of such harm.

Significantly, the district court *upheld* NMFS's expert "analysis of acoustic impacts" on species in SOCAL that are listed as endangered or threatened under the

Endangered Species Act, finding that NMFS's biological opinion (J.A. 90-106.7; E.R. 771-943) was based on the "best scientific and commercial data available." Pet. App. 215a-216a. That court-endorsed analysis concludes that (1) listed species (including blue, humpback, and sperm whales) will likely experience only "temporary" behavioral reactions that are "not likely to affect the reproduction, survival or recovery of these species," and (2) no members of such species are anticipated to die or sustain any "harm or injury." J.A. 106.1-106.2.

NMFS similarly determined that members of the remaining non-listed marine mammal species in SOCAL (including beaked whales) would likely exhibit "temporary behavioral responses" from the Navy's modeled sonar exposure and, while acknowledging scientific uncertainty surrounding beaked-whale impacts, that the Navy's exercises through January 2009 would not likely result in any "adverse population effects for any of these marine mammal[s]." Pet. App. 258a; Gov't Br. 41-43.[3] The district court recognized that it was "not equipped" to "conduct a de novo review of the scientific conclusions of an agency," Pet. App. 205a, yet neither it nor the Ninth Circuit gave NMFS's expert determination the substantial weight it was due. Pet. App. 65a n.53, 136a.[4]

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[3] NRDC incorrectly asserts (at 42) that the government "effectively" conceded that the exercises in this case would have a significant environmental impact. Because the district court's January 2008 injunction imperiled the Navy's next, impending large-scale exercise, the Navy sought emergency alternative arrangements on the basis of the *court's* finding of a likelihood of significant impact. See Gov't Br. 15, 32-33.

[4] Notably, portions of the district court's decision reflect a fundamental misunderstanding of relevant concepts such as decibel measurements. *E.g.*, Pet. App. 100a & n.6. A decibel level reflects the ratio of a measured quantity to a reference quantity, *i.e.*, $dB = 10 \log_{10} (Q / Q_{ref})$.

Rather, as respondent CCC acknowledges (Br. 9, 27), the district court largely relied upon the Navy's analysis and modeling in its EA. Pet. App. 100a, 157a, 162a-163a, 204a-205a. Respondents contend that the model's prediction of 84,764 annual Level-B harassment exposures (roughly 170,000 over two years), J.A. 224, is an "extraordinary number" relative to the size of populations in SOCAL. NRDC Br. 42.[5] In context, however, the

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See Lawrence E. Kinsler et al., *Fundamentals of Acoustics* 130 (4th ed. 2000). Just as 32 degrees is not meaningful without knowing whether the "degrees" are Fahrenheit or Celsius, sound intensity levels expressed in decibels cannot be directly compared without applying a correction to account for the different reference intensities used in air (roughly 10^{-12} W/m^2) and water (roughly 6.76×10^{-19} W/m^2), which themselves are functions of the reference pressures in and acoustic impedances for air and water. See *id.* at 125-126, 130-131.

The district court's comparison of the Navy's total received energy flux density level (EL) threshold for Level-B harassment in water (expressed in "dB re 1 μPa^2-s") to acceptable workplace sound levels *in air* under OSHA regulations not only ignores the critical difference in decibel references, but also compares different *types* of quantities. See Pet. App. 152a & n.4; E.R. 214, 218. To compare the Navy's harassments thresholds (in water) of 173, 195, and 215 dB re 1μPa^2-s (see J.A. 166; E.R. 220) one would have to examine total received energy flux densities in air of roughly 111, 133, and 153 dB re 20μPa^2-s. See generally *Fundamentals of Acoustics* 130-131. The district court's apples-to-oranges comparison therefore provides no support for the injunction.

[5] These figures are due in part to the generous assumptions made in the EA. The model approximated the number of exposures for each species by estimating the ocean area for which the cumulative received sound energy from sonar pings per day of exercises would reach the model's Level-A and Level-B thresholds and multiplying that area by the population density for each species. E.R. 218, 860-862. Due to practical limitations inherent in that approach, the output over-estimated the number of marine-mammal exposures by (1) assuming that mammals are static and thus will not move away from sonar sources, (2) assuming that the Navy's own mitigation measures are not used, and (3)

Navy's EA makes clear that the number reflects instances of sonar exposure resulting in only a temporary, short-term, non-injurious response. Gov't Br. 9, 45 n.9. A temporary or non-injurious response is not *irreparable* harm.

While respondents dispute the EA's own description of its results, the evidence overwhelmingly confirms it. A full 86% (72,772) of the annual Level-B exposures involve common dolphins, J.A. 223-224, which are abundant in SOCAL and the population of which has *increased* notwithstanding decades of sonar exercises. E.R. 153, 159; cf. Gov't Br. 9 n.2. Other species predicted to have such temporary behavioral reactions likewise showed no special sensitivity to sonar exposure. See, *e.g.*, J.A. 520-521, 524 (harbor porpoise). And, while respondents cite to the EA's prediction of Level-B exposures for endangered blue whales as justifying injunctive relief (NRDC Br. 42-43), the district court upheld NMFS's conclusion that *no* member of an endangered or threatened species (including blue whales) is likely to be killed or injured or to sustain any lasting harm based on the model's prediction of short-term behavioral responses to sonar exposure. See pp. 19-20, *supra*. That conclusion is confirmed by the fact that the population of blue whales has been stable or increasing in SOCAL over the past decade. J.A. 232, 541.

b. Respondents' failure to demonstrate irreparable injury to any affected species is fatal to the preliminary injunction even assuming a showing of irreparable harm to marine mammals would be enough. But to obtain an injunction, plaintiffs must demonstrate that *they*—not

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calculating daily exposures, which can greatly exceed the number of affected mammals (because a single animal may account for multiple exposures). J.A. 171, 175-176, 184.

the environment—will suffer irreparable harm. Gov't Br. 43-44; cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (plaintiff challenging federal action allegedly threatening species' extinction lacks standing unless she both proves threat to species and that she is "'directly' affected apart from [her] 'special interest' in th[e] subject"). While NRDC argues that the "entire species" need not be jeopardized, NRDC Br. 45-46, there must at least be harm to the species population with which the members interact. Cf. *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 535, 538 n.5, 545 (1987) (addressing purported long-term damage to "subsistence resources" used by plaintiff villages for hunting, fishing, and consumption and stating that "the balance of harms will usually favor the issuance of an injunction" if threatened long-term or permanent "[e]nvironmental injury" is "sufficiently likely"). Because respondents' members claim benefits from viewing mobile wildlife species, unless a significant long-term, population-level effect meaningfully and irreparably degrades their ongoing viewing activities, any environmental harm will not significantly impact—much less irreparably injure—respondents. See Gov. Br. 43-44.

c. In the end, respondents rest their case on potential harm to the elusive and notoriously difficult-to-study beaked whale to justify the injunction. The Navy's model predicted only short-term, non-injurious Level-B exposures for beaked whales, but tabulated those exposures as non-lethal "Level A" exposures based on a "policy" decision to reflect scientific uncertainty surrounding beaked-whale responses. Gov't Br. 9-10, 44-45.[6] Re-

[6] NRDC incorrectly suggests that 436 predicted (Level-B) exposures for Cuvier's beaked whales will affect one-third of the minimum west-

spondents seek to litigate that scientific uncertainty. Respondents claim, for instance, that beaked-whale injuries would not likely result in strandings in SOCAL, population declines would be difficult to detect, and SOCAL is a "key" area for beaked whales. NRDC Br. 3, 45. However, respondents base their claims on research from mass strandings of live beaked whales at significant distances from temporally correlated sonar sources, *e.g.*, J.A. 691, 701, and the absence of *any* such stranding in SOCAL over 40 years is dispositive.

Moreover, "beaked whales occur in all major seas," and the 23 so-called "key" areas proposed for targeting conservation efforts involve vast swaths of coastal territory worldwide, including the northeastern North American continental shelf and California's *entire* coastal shelf. J.A. 714-716. Ultimately, "[l]ess is known about many extant beaked whale species than about some mammals that became extinct thousands of years ago," J.A. 714, but that uncertainty obviously does not affirmatively establish the requisite likelihood of irreparable injury to beaked whale stocks in SOCAL. Gov't Br. 41-42; cf. J.A. 547-557. To the contrary, the *absence* of scientific information about beaked whales and their behavioral responses to sonar in SOCAL underscores the speculative basis of the harm asserted by respondents and the fact that respondents have not met their burden

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coast stock estimate of 1121 whales (J.A. 185). NRDC Br. 5. NRDC itself recognizes that exposures cannot be equated to the number of mammals affected because the EA assume that one marine mammal could be subjected to multiple exposures. *Ibid*. (attributing 900 Level-B exposures to estimated minimum population of 119 pygmy sperm whales); cf. p. 21 n.5, *supra*.

of proof in establishing irreparable injury even as to beaked whales.[7]

Finally, even if respondents' predictions regarding beaked whales were correct, they would nevertheless fail to establish that *their members* would in turn sustain irreparable injury without preliminary relief. Not one of NRDC's members or declarants, not even the well-traveled Mr. Cousteau, contends that he or she has seen or worked with beaked whales or has any plans to do so. J.A. 384-466. Nor would it be reasonable to assume that their recreational and other activities involving "whales" generally concern beaked whales. Beaked whales prefer "deep waters beyond the shelf edges where relatively few research vessels venture," J.A. 714, and NRDC's own expert stated that beaked whales are rarely seen even by trained lookouts and stay submerged for long periods, making their detection unlikely even with aerial monitoring. J.A. 488-489.

C. The Balance Of Hardships And The Public Interest Cannot Support The District Court's Injunction

Respondents' contention that the district court permissibly balanced the parties' hardships and the public interest falls far short. For instance, respondents defend the district court's and the Ninth Circuit's total failure to consider the President's determination by asserting that the President was either "irrelevant" (CCC Br. 36) or announced only the general importance of the

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[7] The record does contain evidence that beaked whales have stranded in SOCAL, but those strandings were not tied to sonar use (and even respondents do not argue to the contrary). See Gov't Br. 41-42. The fact that there is evidence of beaked-whale strandings in SOCAL that are not linked to sonar use undermines respondents' reliance on the assertion that injuries to beaked whales would be undetectable.

enjoined exercises without addressing the impact of the injunction itself (NRDC Br. 56 n.18). The President, however, in direct and immediate response to the district court's injunction, determined that it "undermine[d] the Navy's ability to conduct realistic training * * * necessary to ensure * * * combat effectiveness," thereby prompting him to grant an exemption under the Coastal Zone Management Act to "enable the Navy to train effectively." Pet. App. 232a. Given the serious separation-of-powers concerns implicated by the courts' independent assessment of wartime military training needs, the lower courts' total failure to address such a determination by the President—the Commander-in-Chief—alone constitutes an abuse of equitable discretion.

Nor do respondents meaningfully answer the district court's and Ninth Circuit's failure to evaluate the relative *magnitude* of the harms to national security and marine mammals. In any reasonable weighing of the equities, even a small likelihood of failure in matters "essential to national security" (NRDC Br. 52) would outweigh certain harm to respondents' generalized interest in the enjoyment of marine mammals. That conclusion is reinforced by Congress's authorization in the MMPA for taking military action that will harm marine mammals where, as here, the Secretary of Defense determines that such action is "necessary for national defense." See Gov't Br. 35. The Ninth Circuit's observation (echoed by respondents, CCC Br. 44) that the Navy—like a private litigant enjoined in a run-of-the-mill case—could return to court for emergency relief *after* it fails to complete essential military training underscores the courts' failure to properly consider the magnitude of such harm. Gov't Br. 47.

NRDC also misses the point in arguing (at 53) that restrictions on training in surface-ducting conditions are warranted because the Navy has successfully trained in the past when such conditions were *absent*. The Navy cannot control when such conditions are present—in training or in actual hostilities. When such conditions *do* occur during ongoing exercises, however, it is critical for the Navy to train in those conditions because enemy submariners are trained to exploit surface ducting to evade detection. See Pet. App. 299a, 333a. Imposing a 75% reduction in sonar power—even in the absence of any marine mammals—makes realistic training in such circumstances impossible. Gov't Br. 53-54.

Respondents make no effort to defend the Ninth Circuit's reliance on low-frequency active sonar as reflecting the feasibility of a 2200-yard shutdown zone for MFA sonar training. Like the Ninth Circuit (Pet. App. 85a n.67), CCC (at 40 n.10) defends the injunction by pointing to procedures purportedly followed by NATO or the Royal Australian Navy. That approach underscores the dangers of disregarding the professional judgments of the U.S. naval officers who have submitted declarations in this case. Australia has not operated an aircraft carrier since 1982 and possesses no warships similar to the Navy's carrier-like amphibious assault ships, whose protection requires the integrated strike-group training at issue in this case. See Chris Bishop & Chris Chant, *Aircraft Carriers* 62 (2004); 3 *The Australian Centenary History of Defense: The Royal Australian Navy* 225-228, 275-276 (David Stevens, ed. 2001). And NATO does not operate its own strike groups, does not require the type of integrated training at issue here, and, instead, utilizes forces provided and trained by its member nations.

NRDC erroneously suggests (at 54 n.16) that the Navy *voluntarily* ceases sonar use in tactically significant times. The after-action reports that NRDC cites indicate that the Navy has determined (in post-exercise reconstructions of training events) that sonar shutdowns may have adversely affected training operations because, in some cases, an undetected submarine was nearby. But those reports do not indicate whether the shutdowns were voluntary and, more importantly, they demonstrate the real risks of imposing shut-down zones. Indeed, the reports' explanation that submarines were *not* detected reinforces Admiral Locklear's explanation that, because the "stakes are too high," commanders never voluntarily surrender contact with a submarine and stop sonar transmissions only in what they perceive—at the time—to be tactically insignificant contexts. Pet. App. 355a-356a.

Respondents' assertion that the Navy's prior mitigation measures support the injunction's 2200-yard shutdown zone is equally without merit. CCC (Br. 34-35), for instance, relies on a telephone discussion with Navy personnel regarding experimental research at Monterey Bay, which has no relationship to the strike-group exercises here. Cf. J.A. 284-285. NRDC (Br. 7-8), in turn, notes that the Navy for a time in the past reduced sonar power when marine mammals were spotted within a 2000-meter zone *if* significant surface-ducting conditions were present. J.A. 373, 500-502. That measure, which was less restrictive than the district court's injunction, was found to restrict realistic training and to be difficult to employ uniformly and not proven to protect mammals. J.A. 327, 503, 505; Pet. App. 299a-300a. It was therefore halted after conferring with NMFS. See *id.* at 219a, 225a-226a.

In the end, assessing the risk to critical Navy exercises is a matter of military judgment, and the President and the Nation's top naval officers have determined that the restrictions imposed by the preliminary injunction unacceptably risk the accomplishment of missions that are in the paramount interest of the United States. Gov't Br. 13-14. The Ninth Circuit's willingness to independently evaluate that judgment on the basis of factors reflecting a layman's misunderstanding of vital military matters is profoundly misguided and warrants reversal by this Court.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to vacate the preliminary injunction.

Respectfully submitted.

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Acting Solicitor General

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